

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of APPLIED TECHNOLOGY, INC. Request for Waiver of Distance Separation Standards for Local Channel Exclusivity in the 929-930 MHz Band

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ORDER

Adopted: March 27, 2001

Released: March 28, 2001

By Deputy Chief, Commercial Wireless Division, Wireless Telecommunications Bureau:

1. On October 27, 1999, Applied Technology Group, Inc. (Applied) filed a petition for reconsideration (Petition) of the Division's September 29, 1999 order concerning the above-captioned request for waiver. On March 29, 1994, Applied had filed a request for waiver of section 90.495(a)(1)(i)(A) of the Commission's rules, which provides that for paging stations in the 929-930 MHz band to be eligible for local channel exclusivity, the system must consist of at least six transmitters, and each must be located within 25 miles (40 kilometers) of at least one other transmitter in the system. Applied requested a waiver to obtain local exclusivity for three of its transmitters because the distance of the subject transmitters from the closest transmitter in the system exceeds 25 miles, with locations 35, 43, and 47 miles distant. The *Order* denied the requested waiver, and Applied now seeks review of that determination. For the reasons discussed below, we deny the Petition for Reconsideration.
2. In accordance with section 22.119 of the Commission's rules, a waiver may be granted if it is shown that: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or that the applicant has no reasonable alternative. The *Order* denied the waiver sought by Applied, stating that "we are not persuaded that grant of this waiver would be in the public interest, nor do we find that Applied has presented unique or unusual factual circumstances sufficient to justify grant of its waiver request." The *Order* observed that Applied had proffered only general statements in its waiver justification, which was grounded essentially in the claims that no suitable transmitter sites were available that would meet the distance separation standards and that, even if acceptable site locations were available, they would be of no commercial utility and not financially warranted.
3. Applied argues that the Division did not give its waiver request the "hard look" required by *WAIT Radio v. FCC*. Applied contends that the Division failed to adequately articulate its reasons for denial. The Division disagrees with Applied's contentions. The Division carefully considered the request for waiver and clearly stated its reasons for denying Applied's waiver request. Specifically, the Division stated that Applied neither produced persuasive evidence that the grant of the waiver would be in the public interest, nor presented unique or unusual facts sufficient to justify grant of its waiver request. *WAIT Radio* requires the Commission to give a waiver request a "hard look" and not a perfunctory denial. In resolving waiver requests, however, the Commission is not required to "author an essay for the disposition of each application."

Notwithstanding Applied's claims, the Division met the "hard look" requirement in assessing the waiver request and by providing a reasoned explanation for denial of Applied's waiver proposal.

4. Applied next claims that it had made a "thorough showing" in support of its waiver request. Applied further asserts that it had "demonstrated unique or unusual factual circumstances." In fact, under the first prong of the waiver test, Applied has not made any showing or provided any evidence that the underlying purpose of the rule would be frustrated by its enforcement and the denial of the requested waiver. Instead, Applied argues that compliance with the 25 mile separation rule would not result in the most efficient use of the 929-930 MHz spectrum. The Commission has in other circumstances denied waiver of section 90.495(a)(1)(i)(A) where the applicant based the request on a similar rationale. The Commission maintains that the 25 mile separation requirement is necessary to ensure that an exclusive local system serves a contiguous geographic area.

5. Under the second prong of the test, Applied failed to show unique or unusual circumstances sufficient to justify a waiver, and failed to provide evidence that compliance with the rule would be unduly burdensome. Initially, Applied offers only general statements in its request for waiver of the distance separation standards. Applied's showing does not provide the necessary justification that the circumstances described in its waiver filing are somehow unique. In fact, many applicants confront similar concerns, and the Commission has denied waiver requests based on facts similar to those in the instant case. Moreover, Applied has demonstrated no benefit to the public interest from a grant of the waiver proposals, but only benefit to its private business interests.

6. The Court of Appeals for the District of Columbia Circuit has reminded the Commission that "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The agency must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation." Consistent with that guidance, the record before us, and our action on similar waiver requests, we are neither persuaded that the grant of this waiver would be in the public interest, nor do we find that Applied has presented unique or unusual circumstances sufficient to justify grant of its waiver request.

7. Accordingly, IT IS ORDERED that, pursuant to authority delegated by section 4(i) of the Communications Act, as amended, 47 U.S.C. § 154(i), and by sections 0.331 and 22.119 of the Commission's rules, 47 C.F.R. §§ 0.331, 22.119, the waiver request filed by Applied Technology Group, Inc. on March 29, 1994 is DENIED.

FEDERAL COMMUNICATIONS
COMMISSION

Katherine M. Harris\
Deputy Chief, Commercial Wireless Division
Wireless Telecommunications Bureau